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Issue date: 25Apr2002

CASE NO.: 2001-AIR-5

In the Matter of

GEORGE T. DAVIS, Jr. and DIANE DAVIS,
Complainants

v.

UNITED AIRLINES, INC.
Respondent

RULING AND ORDER DENYING RESPONDENT'S MOTION FOR SUMMARY DECISION ON GEORGE DAVIS' CLAIM

FACTUAL AND PROCEDURAL HISTORY

This proceeding arises under the employee protection provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR Act" or "AIR21"), 49 U.S.C. §§ 42121, *et seq.*, Public Law 106-181, Title V, § 519 and the regulations thereunder at 29 C.F.R. Part 24.

On February 13, 2001, Complainants, George T. Davis and Diane Davis, filed their complaint, wherein they alleged that Respondent, United Air Lines, Inc., (hereinafter "United" or UAL") suspended George T. Davis, without pay and later terminated his employment in retaliation for providing information regarding two alleged safety violations to pilots of United, which regarded a hydraulic leak on September 29, 2000 and a defective tire on November 15, 2000. [1]

Mr. Davis alleges that on September 29, 2000, he found evidence of a hydraulic leak after inspecting an aircraft. Mr. Davis asserted that his supervisor, Larry Cannon, signed off the aircraft as ready for flight, thereby overriding Mr. Davis' safety assessment. Thereafter, Mr. Davis notified the

Captain of Flight 437, Kevin Lambeth, of his safety assessment. Pilot Lambeth confirmed the

[1] On April 23, 2002, I granted UAL's Motion for Summary Decision relating to complainant Diane Davis. In that Ruling and Order dismissing her complaint, I found that the AIR Act did not provide Mrs. Davis, also a UAL employee, "derivative" protection for the protective activity, if any, of her spouse, George Davis, a UAL mechanic. Moreover, nothing in the entire proceeding even suggests she suffered from any type of "retaliation" or discrimination by UAL as a result of her husband's activities. I denied the complainant's Cross Motion for Summary Decision, on April 23, 2002.

existence of the leak and refused to take off until the leak was fixed, which caused a delay in take-off.

In addition, Mr. Davis alleges that, on November 15, 2000, he discovered a problem with a tire on one of the aircraft and issued an order for the tire to be repaired before take-off. Mr. Davis further alleged that his supervisor, Dan Rash, claimed that the tire did not need to be repaired and cleared the aircraft for take-off. Again, Mr. Davis notified the captain of the aircraft of the status of the tire. The captain then insisted that the tire be changed, which resulted in a one hour flight delay.

On November 15, 2000, United conducted an investigation regarding Mr. Davis' continuing inability to dispatch his flights on time. As a result of the investigation, United placed Mr. Davis on suspension without pay. On November 30, 2000, United terminated Mr. Davis' employment effective November 16, 2000. On December 12, 2000, Mr. Davis appealed his termination action. After discussions with the International Association of Machinists and Aerospace Workers ("IAMAW") union, on December 15, 2000, Mr. Davis was reinstated to the position he occupied prior to November 16, 2000, but he was assigned to a new work area. United reduced the discipline (termination action) to a "Level 4." On December 18, 2000, Mr. Davis returned to work, but he was not paid for lost earnings during his suspension, November 15, 2000 through and including December 17, 2000. Mr. Davis concludes that he was suspended without pay and terminated from his employment in retaliation for providing information and/or causing information to be provided to the Federal Aviation Administration.

United asserts that its decision to terminate Mr. Davis was related to his "delay performance" over several months and was not the result of the two incidents cited by Mr. Davis. Specifically, United asserts that Mr. Davis' delay performance, a measure of his ability to dispatch trips on time, began to deteriorate to a level below his (average) performance level. More specifically, United contends that on November 15, 2001, Mr. Davis was notified by Gene Sibley, an Operating Manager of the Maintenance Department, that he was being held out of service, because he had allegedly the worst delay performance of any United mechanic at Denver International Airport ("DIA"). United notes that Mr. Davis' delays had increased from three per month to more than fifteen per month. United further asserts that the November 30, 2000 decision to terminate Mr. Davis was based upon Mr. Davis' inability to provide a plausible explanation for his decreased delay performance. Accordingly, United considered Mr. Davis' conduct an illegal job action aimed to aid the IAMAW Union, of which Mr. Davis is a member,denials of her pleading, but must set forth specific facts showing that there is a genuine issue for trial in its efforts in the negotiation of a new contract with United.

United's Basis for its Motion for Summary Decision

On April 10, 2002, United filed a Motion for Summary Decision. United argues that Mr. Davis did not engage in any protected activity provided by the AIR Act, and therefore, Mr. Davis, cannot, as a matter of law, pursue a claim under the AIR Act. More specifically, United asserts

that Mr. Davis never reported any violation of any order, regulation, or standard of the FAA, because the planes involved in both incidents were dispatched in a safe condition. Additionally, United asserts that it is entitled to summary decision on the basis that there is no evidence that United violated any safety regulations, since in both incidents the planes were dispatched in a safe condition.

Complainant's Response to United's Motion for Summary Decision

On April 24, 2002, Complainant filed Response to United's Motion for Summary Decision. Mr. Davis maintains that the evidence of record establishes that Mr. Davis engaged in activity protected by the AIR Act, and therefore, United's Motion for Summary Decision should be denied. Additionally, Complainant cited numerous FAA regulations, which he argues were violated by his supervisors at United. Accordingly, Complainant disputes United's assertion that no safety violations occurred since the planes were repaired prior to dispatch. Complainant further argues that the fact that the planes were dispatched in a safe condition does not deprive Mr. Davis of protection under the AIR Act.

LAW

a. *Standard of Law - Summary Decision*

An administrative law judge may enter summary judgment for either party if the pleadings, affidavits, material obtained by discovery or other materials show that there is no genuine issue as to any material fact. 29 C.F.R. §18.40, *see also* Federal Rule of Civil Procedure 56(c). An issue is "genuine" if sufficient evidence exists on each side so that a rational trier of fact could resolve the issue either way and an issue of fact is "material" if under the substantive law it is essential to the proper disposition of the claim. *Alder v. Wal-Mart Stores, Inc*., 144 F.3d 664, 670 (10th Cir. 1998). The mere existence of some factual dispute will not defeat an otherwise properly supported motion for summary judgment because the factual dispute must be material. *Schwartz v. Brotherhood of Maintenance Way Employees*, 264 F.3d 1181, 1183 (10th Cir. 2001). The usual and primary purpose of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses. *Celotex Corp. v. Catrett*, 477, U. S. 317, 323-34 (1986).

If the moving party properly supports its motion, the burden shifts to the non-moving party, who may not rest upon the mere allegation or denials of her pleading, but must set forth specific facts showing that there is a genuine issue for trial. *Muck v. United States*, 3 F.3d 1378, 1380 (10th Cir. 1993). In setting forth these specific facts, the non-moving party must identify the facts by reference to affidavits, deposition transcripts, or specific exhibits. *Adler*, 144 F.3d at 671. The non-moving party cannot rest on ignorance of facts, on speculation, or on suspicion and may not escape summary judgment in the mere hope that something will turn up at trial. *Conaway v. Smith*, 853 F.2d 789, 793 (10th Cir. 1988). However, it is well settled that a court draws all reasonable inferences in favor of nonmoving party when reviewing a motion for summary judgment. *Trujillo v. University of Colo. Health Sciences Ctr.,* 157 F.3d 1211, 1213 (10th

Cir.1998), *see also*, *Curtis v. Oklahoma City Pub. Sch. Bd. of Educ.,* 147 F.3d 1200, 1214 (10th Cir.1998) ("In determining whether a genuine issue of material fact exists, the court must draw all reasonable inferences in favor of the nonmoving party.").

b. *Entitlement under the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 29 C.F.R. Part 179, 49 U.S.C. § 40101 et. seq.*

The AIR Act states that it is a violation for any air carrier to intimidate, threaten, restrain, coerce, blacklist, discharge or in any other manner **discriminate against any employee because the employee**: 1) provided, caused to be provided, or is about to provide (with any knowledge of the employer) to the air carrier or the Federal government information relating to any violation or alleged violation of any order, regulation, or standard of the FAA or any other provision of Federal Law; 2) filed, caused to be filed, or is about to file (with any knowledge of the employer) a proceeding relating to any violation or alleged violation of any order, regulation, or standard of the FAA or any other provision of Federal Law; 3) testified or is about to testify in such a proceeding; or 4) assisted or participated or is about to assist or participate in such a proceeding. 29 C.F.R. § 1979.102.

In order to establish a prima facie case under the AIR Act the complainant must show:

1) The employee engaged in a protected activity or conduct;
2) The named person knew, actually or constructively, that the employee engaged in the protected activity;
3) The employee suffered an unfavorable personnel action; and
4) The circumstances were sufficient to raise the inference that the protected activity was likely a contributing factor in the unfavorable action.

29 C.F.R.§ 1979.104(b)(1). In regard to the interpretation of the "contributing factor" requirement, in *Taylor v. Express One International*, 2001-AIR-2 (Feb. 2002), the administrative law judge adopted the definition in *Marano v. Department of Justice*, 2 F.3d 1137 (Fed. Cir. 1993), interpreting the Whistleblower Protection Act, 5 U.S.C. § 1221(e)(1):

> The words "contributing factor"...mean any factor, which alone or in connection with the other factors, tends to affect in any way the outcome of the decision. This test is specifically intended to overrule the existing caselaw, which requires a whistleblower to prove that his protected activity was a "significant", "motivating", "substantial", or "predominant" factor in a personnel action in order to overturn that action.

Once the complainant establishes his or her prima facie case, the burden shifts to the respondent to demonstrate, by clear and convincing evidence, that it would have taken the same unfavorable personnel action in the absence of the complainant's protected behavior or conduct. 29 C.F.R.§1979.104(c).

If the respondent meets its burden to produce legitimate, non-discriminatory, reasons for its employment decision, the inference of discrimination is rebutted, and the complainant must then assume the burden of proving by a preponderance of the evidence that respondent's proffered reasons are "incredible and constitute a pretext for discrimination." *Taylor v. Express One International*, 2001-AIR-2 (Feb. 2002), slip op. at 37, quoting *Overall v. Tennessee Valley Authority*, Case No. 1997-ERA-53, at 13 (ARB Apr. 2001).

FINDINGS OF FACT AND LAW

A. Summary Decision is inappropriate in the instant matter, as there exist genuine issues of material fact regarding Mr. Davis' entitlement under the AIR Act.

Despite the allegations set forth in United's Motion for Summary Decision, there remain genuine issues of material fact regarding Mr. Davis's entitlement, if any, under the AIR Act. [2] While United asserts that Mr. Davis never engaged in a protected activity, since he never reported any violation of any order, regulation, or standard of the FAA, Complainant has factually disputed this assertion. Complainant argues that, in both incidents, Mr. Davis reported the alleged safety violations to the pilots of the aircraft. In addition, Mr. Davis asserts that while he never made a complaint to the FAA, he did provide a statement to the FAA regarding the November 15, 2000 tire incident. (*George Davis depo*. pgs. 217-220). Complainant further argues that United's strict interpretation of "protected activity" is without reason, since the scope of "protected activity" under Federal anti-retaliation laws is routinely broadly interpreted. Accordingly, Complainants argue that the fact the planes were repaired prior to take off and the fact that Mr. Davis reported the alleged safety violations to the pilots of the aircraft versus the FAA does not deprive Mr. Davis of protection under the Act. Since this is a legal issue to be determined by this Court, I find that summary decision on this issue is premature and unwarranted at this time.

Second, Complainant disputes United's contention that it is entitled to summary decision on the basis that there is no evidence that United violated any safety regulations, since in both incidents, the planes were dispatched in a safe condition.[3] Complainant has identified numerous

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[2] This Court acknowledges the comprehensive and thorough effort made by counsel for the Complainant, George Davis, in preparing the Response to United's Motion for Summary Decision.

[3] More specifically, Mr. Davis alleges that the following regulations were violated by United:
-14 C.F.R. § 43.13(a), which requires that maintenance records be performed consistently with the applicable maintenance manual.

FAA regulations, which he contends were violated by his supervisors when they allegedly overrode Mr. Davis' safety recommendations. Accordingly, a genuine issue of material fact remains, as to what, if any, safety violations were made by the representatives of United, and therefore, United is not entitled to summary decision, as a matter of law.

CONCLUSION

United has failed to establish that no genuine issue of material fact exists for trial. To the contrary, the evidence presented by both parties demonstrates that significant legal and factual issues regarding Mr. Davis' entitlement, if any, under the AIR Act remain. Furthermore, since it is routinely held that a court must draw all reasonable inferences in favor of the nonmoving party when reviewing a motion for summary judgment, *Trujillo supra,* I find that summary decision is inappropriate in the instant matter. Accordingly, for the reasons set forth above, United's Motion for Summary Decision is denied.

RULING AND ORDER

It is **ORDERED** that Respondent's Motion for Summary Decision, pursuant to 29 C.F.R. § 18.40, is hereby **DENIED.**

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RICHARD A. MORGAN
Administrative Law Judge

RAM:ALS:dmr

-14 C.F.R. § 43.15(a), which requires that inspections be performed so as to determine whether the aircraft, or portions, thereof, meet all applicable airworthiness requirements.
-14 C.F.R. § 43.13(a)(2), which requires that inspections conform to the applicable procedures.